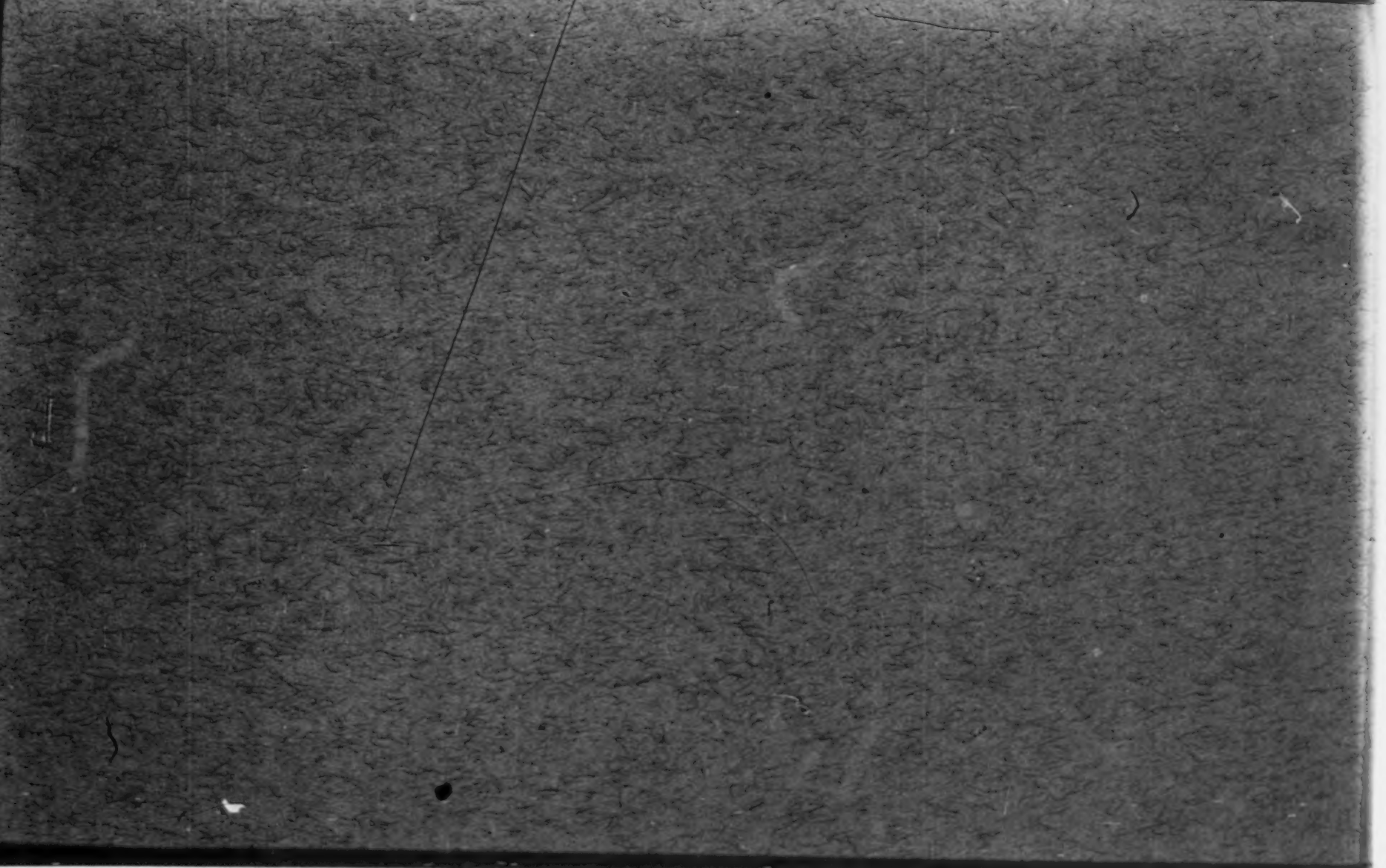


In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1242

DENNISON MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9-19) is not yet officially reported. The Board's decision and order (R. 1140-1160)[1] are reported at 168 NLRB No. 131.

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[1] "R." refers to the joint appendix to the briefs in the court below.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1969, and a petition for rehearing was denied on January 12, 1970 (Pet. App. 9, 20). The petition for a writ of certiorari was filed on February 20, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, it was proper for the National Labor Relations Board to decide whether the employer had unlawfully dominated a labor organization representing its employees even though that issue had not been specifically alleged in the original complaint.

2. Whether substantial evidence supports the Board's finding that the employer had in fact dominated that labor organization, in violation of Section 8(a)(2) and (1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition (Pet. App. 10, n. 1; 21-22).

STATEMENT

In 1919, the Company's employees established a labor organization ("the Committee") which was characterized by Henry S. Dennison, a former presi-

dent of the Company, as a "company union." [2] For the past 50 years, all Committee expenses have been wholly subsidized by the Company (R. 33, 92-93, 885-891, 923). The Committee's constitution provides that a restricted class of employees can vote for Committee representatives, and gives the employees no other voice in Committee affairs—there are no employee meetings, and they pay no dues (R. 45, 60, 78, 102-103, 910-913, 926, 1144). The constitution also establishes smaller committees, the most important of which is the procedure committee which receives and channels the reports of the other committees and determines the agenda of the periodic meeting of the representatives selected by the employees (R. 47-51, 916, 1145, n. 9). Through the Company's equal representation on the procedure group, the activities of the Committee are known to and controlled by the Company (R. 128). The constitution empowers the Company to veto any amendment which "alters the relationship" between management and the employees (R. 920). A grievance cannot proceed to arbitration unless the Company arbitrator agrees to the selection of a third arbitrator, and the Company agrees to defray the costs of arbitration (R. 1148, n. 14, 596, 918).

On February 26 and April 6, 1965, the United Papermakers and Paperworkers, AFL-CIO ("the

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[2] In opposing Section 8(2) of the Wagner Act (Section 8(a)(2) of the present Act), Dennison testified that his company union could not continue to exist if that provision were enacted. Hearings before the Committee on Education and Labor, United States Senate, 73d Congress, 2d Session on S. 2926, Part 2, pp. 400-404.

Union") filed petitions for Board elections among the employees who had theretofore been represented by the Committee (R. 811-812). The Union lost the ensuing election held on July 15 (R. 825). The Union then filed a charge alleging that the Company's connection with the Committee violated Section 8(a)(2) and (1) of the Act (R. 824). On September 8, a complaint issued alleging that the Company had rendered unlawful aid, assistance, and support to the Committee by recognizing it as the employees' exclusive bargaining representative and by contributing financial and "other support" (R. 846). In a separate count, the complaint further alleged that the Company "did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(2) of the Act" (R. 847).

On May 2, 1966, after a three-day hearing, the Trial Examiner issued his decision finding that the Company had assisted the Committee in violation of Section 8(a)(2) of the Act; but he refused to consider the issue whether the Company had dominated the Committee because the General Counsel had "failed to allege in his complaint that the conduct constituted domination" (R. 7). The Union filed exceptions with the Board to the Examiner's failure to find domination, and the General Counsel likewise raised this point in his brief to the Board (R. 1157). On November 1, 1966, the Board, concluding that the general Section 8(a)(2) count in the complaint was sufficient to encompass domination, remanded the case to the Examiner to afford the Company an opportunity to litigate that issue (R. 1158).

On February 13 and 14, 1967, a substantially *de novo* hearing was held before the Examiner. The Board, adopting the Examiner's supplemental decision, found that the Company had violated Section 8(a)(2) and (1) of the Act by dominating and contributing financial and other aid and assistance to the Committee (R. 1159).[3] The Board ordered the Company to cease and desist from the unfair labor practices found, and to disestablish the Committee as the collective bargaining representative of its employees. The Board also ordered the election set aside. (R. 1154-1155, 1159.)

The court of appeals, although disagreeing with the Board that the general Section 8(a)(2) count of the complaint encompassed an allegation of domination, nevertheless found that, as a result of the Board's remand and other circumstances, the Company was sufficiently apprised of, and had a full opportunity to litigate, the domination issue. The court further found that the Board's finding that the Company had dominated the Committee was supported by substantial evidence, and accordingly enforced the Board's order. (Pet. App. 9-19.)

ARGUMENT

The decision of the court of appeals turns on the facts of this particular case, and is correct.

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[3] The Board further found that the Company also violated Section 8(a)(1) of the Act by distributing a letter to its employees shortly before the election exhorting them to vote against the Union and praising the Committee's accomplishments (R. 925).

1. The first question which petitioner seeks to raise—*i.e.*, whether the Board may *sua sponte* amend an unfair labor practice complaint—is not really presented here. For, even if the Board's action in remanding the case for a second hearing on the issue of domination be viewed as an amendment of the complaint to include that issue, the Board did not act *sua sponte* here, but in response to requests made by both the charging party (the Union) and the General Counsel. As the court below noted (Pet. App. 15):

> The issue of the scope of the complaint was a live one when the case was submitted to the Board, for the Papermakers had excepted to the trial examiner's failure to find domination and the General Counsel had sought through its brief to the Board a finding of domination. The Board did not, therefore, unearth an issue which the Company had no reason to know of in advance. * * *

Moreover, since petitioner had the opportunity at the second hearing fully to litigate the issue of domination, and, indeed, relitigate the issues of unlawful aid and assistance, it was not prejudiced by the Board's action in this case; therefore, even if there were a procedural irregularity, it does not warrant review by this Court. See *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-351; *National Labor Relations Board* v. *Thompson Transport Co.*, 73 LRRM 2387, 2388 (C.A. 10).

2. Petitioner's second contention (Pet. 7-8) is essentially an attack on the factual support for the Board's finding of unlawful domination, which was sustained by the court of appeals. Such an evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, the court below correctly sustained the Board's finding of domination.

As shown in the Statement (*supra*, pp. 2-3), the Committee functions at the will of the Company. The Company has power to veto the decisions of the all-important procedure body. The employees are remote from their ostensible bargaining representative, since they have no general meetings, pay no dues, and receive no information concerning Committee activities or deliberations except for bulletins distributed by the procedure body. Moreover, even if the employees wished to amend the Committee's constitution to reduce employer control, such amendment requires the consent of the Company. Finally, arbitration may proceed only by the grace of management; the Company defrays the cost of arbitration and must agree to the choice of a third arbitrator. These factors amply show that the Company has dominated this employee representation plan, in violation of Section 8(a)(2) of the Act. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 266; *National Labor Relations Board* v. *Southern Bell Telephone & Telegraph Co.*, 319 U.S. 50, 58; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 249.

Contrary to petitioner's contention (Pet. 7-8), *Modern Plastics Corp.* v. *National Labor Relations Board*, 379 F. 2d 201 (C.A. 6), is not in conflict but is factually distinguishable. In that case, the labor organization did not operate under a constitution and by-laws which vested ultimate authority in the employer. Moreover, there, unlike here, the union representatives met individually with employees, who also participated in periodic membership meetings. And in that case the union representatives sometimes met privately and formulated bargaining positions which were neither known to nor controlled by management.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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